

Served: May 6, 1998



**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Issued by the Department of Transportation
on the 6th day of May, 1998

Joint Application of

AMERICAN AIRLINES, INC.

and

BRITISH AIRWAYS PLC

under 49 U.S.C. Sections 41308 and 41309
for approval of and antitrust immunity for
alliance agreement

Docket OST-97-2058

ORDER

Background

On January 10, 1997, American Airlines, Inc. (hereafter "American") and British Airways PLC (hereafter "British Airways") (together "the Joint Applicants") filed an application for approval of and antitrust immunity for an alliance agreement (referred to also as "the Alliance") under 49 U.S.C. §§ 41308 and 41309. The Joint Applicants have filed several motions under Rule 39 of the Department's Rules of Practice, 14 C.F.R. § 302.39, for confidential treatment of documents submitted in support of that application and/or in response to information requests by the Department.

By Order 98-3-31, issued March 30, 1998, we determined that the record of this case was substantially complete. Therefore, the Department required interested parties to file answers to the application by May 11, 1998 (30 business days from the service date of Order 98-3-31), and that replies be filed no later than June 10, 1998.

By letter dated April 8, 1998,¹ the Department directed British Airways to provide certain documents and information for *in camera* review by the Department to determine their relevance to the issues in this case.² At that time, the Department stated that to the extent that it determined that any such material was relevant, the

¹ See document identified in the record of this case as OST-97-2058-167.

² Representatives of U.S. Airways informed the Department of the possibility that certain information in the record of a pending civil case, *U.S. Airways Group, Inc. v. British Airways PLC*, 96 Civ. 5724 (MGC), may be material and relevant to the issues under review by the Department in this case.

Department would order British Airways to file it in the Docket, subject to the carrier's right to request confidential treatment under our Rule 39 procedures.

***In Camera* Review to Determine Relevance and Associated Issues**

As an initial matter, we have previously determined that if, upon review of this material, we find that the information is relevant to this proceeding, we will require that the information be filed in the record. Conversely, if we initially determine that the reviewed information is not relevant, we will not require that the information be filed in the docket, while reserving our right to decide later that the previously reviewed information is relevant after all, and therefore must be placed in the docket. Of course, British Airways may seek confidential treatment of such material under Rule 39.

On April 17 and 20, 1998, the Department reviewed the documents and information that British Airways represented as satisfying the Department's April 8, 1998, request. Based on this *in camera* review, we have determined that the following documents, information, and data are relevant to this proceeding:³

1. Letter dated February 18, 1998, from Jay B. Kasner, Esq. (Skadden, Arps, Slate, Meagher & Flom), representing US Airways, to the Honorable Miriam Goldman Cedarbaum *re U.S. Airways Group, Inc. v. British Airways Plc.* 96 Civ. 5724 (MGC); and exhibits 5 through 11 and 13.
2. Barbara Cassani, General Manager, U.S.A. Alliances
 - Document dated March 15, 1995, beginning with BAU number 316372.
 - Document dated March 23, 1995, beginning with BAU number 316469.
 - Document dated March 27, 1995, beginning with BAU number 023771.
 - Document dated March 28, 1995, beginning with BAU number 317832.
 - Document dated April 5, 1995, beginning with BAU number 317834.
 - Document dated May 1995, beginning with BAU number 317872.
 - Document beginning with BAU number 317886.
3. David Holmes, Director, Corporate Resources
 - Tab 92, BAU numbers 400032-400043.
 - Tab 103, BAU number 458285.
 - Tab 114, BAU numbers 392936-392943.

³ To the extent that British Airways has already filed any of these documents in this proceeding, British Airways should identify each previously submitted document both by date filed and by specific BAP number(s).

4. Michael Jackson, General Manager, Strategic Relationships
 - Tab 66, BAU numbers 374406-374435.
 - Tab 67, BAU numbers 023805-022752.
 - Tab 68, BAU numbers 308266-308268.
 - Tab 69, BAU numbers 405176-405178.
 - Tab 72, BAU numbers 006588.⁴
 - Tab 76, entire document (Global Strategy/Europe Alliances).
 - Tab 87, BAU numbers 00118-00130.
 - Tab 88, BAU numbers 006565-006580.

5. Roger Maynard, Director of Investments and Joint Ventures
 - Tab 194, BAU numbers 026386-026421.
 - Tab 195, BAU numbers 025310-025333.
 - Tab 196, BAU numbers 024225-024339.
 - Tab 200, BAU numbers 315645-315646.
 - Tab 201, BAU numbers 422842-422844.
 - Tab 202, AA0001539-1543.

If, during the course of our further review and analysis, we subsequently determine that some or all of the previously reviewed information is relevant, we reserve the right to require that the information be filed in this docket.

Although the above identified documents may contain information considered sensitive by British Airways, they nonetheless are relevant to the Department's statutory responsibility to evaluate the merits of this case and thus must be part of the record. Therefore, we direct British Airways to submit these additional documents and information into the docket, no later than three business days from the date that this order is served, and to notify all interested parties that are identified on the service list attached to British Airways' joint application when the documents are filed.

By Notice dated July 31, 1997, we found it appropriate to grant interim access to any subsequent materials filed in this docket under a Rule 39 Motion to counsel and outside experts for interested parties who file or who have previously filed appropriate affidavits with the Department in advance, unless the party filing the motion objects. If British Airways finds it appropriate to file a Rule 39 Motion for confidential treatment of these documents, but objects to their interim release, British Airways should segregate the appropriate document(s) and explain how and why the Department's

⁴ We find the following material not relevant to the issues in this case and therefore may be redacted by British Airways: ¶¶ (1) and (2)(a), (b), and (c).

previously established confidentiality procedures would adversely affect the interests of British Airways and are not required in the interest of the public.

Responsive Pleadings

On April 20, 1998, Delta Air Lines, Inc., Trans World Airlines, Inc., and United Air Lines, Inc. filed a joint motion asking the Department to suspend the procedural dates of this case until the Department determines whether British Airways must file additional materials in this docket. On April 28 and 29, 1998, Northwest Airlines, Inc. and US Airways, Inc., respectively, filed an answer supporting the request for suspension of procedural dates in this case.

While these parties would have us suspend our procedural schedule, we find that the revised comment period prescribed in this order is appropriate. We note that interested parties have had limited access to the bulk of the nonpublic record since September 5, 1997 (*see* Order 97-9-4), and other confidentially filed materials since March 28, 1997 (*see* Order 97-3-42). Further, we have found it appropriate to require counsel for the Joint Applicants to make confidential materials available to interested parties at their local offices. We find that these procedures, coupled with our extension here, sufficiently balance the interests of the Joint Applicants for continued processing of the case, and the interested parties need for an adequate opportunity to have access to those documents.

On April 29, 1998, British Airways filed an answer opposing the joint motion to suspend the procedural dates. British Airways also states that, based on its review of the record, “it appears that US Airways must have engaged in undocketed *ex parte* contacts with DOT officials in an effort to get DOT to request access to these litigation materials.”

On May 1, 1998, US Airways, Inc. filed a motion for leave to file and a reply addressing certain issues raised by British Airways in its April 29 answer.⁵ US Airways stated that the claim of British Airways is incorrect. British Airways refers to a letter to its counsel from DOT dated April 8, 1998. According to British Airways, this letter, requesting the submission for DOT’s inspection of certain British Airways documents in a federal court civil suit, indicates that DOT had learned of the existence of such materials from US Airways, and, finding no communication in the docket between US Airways and DOT concerning these materials, British Airways presumes that US Airways engaged in *ex parte* contacts. US Airways received court permission to inform DOT. In a responsive pleading, US Airways disputes the claim of an *ex parte* communication.

⁵ We will grant the motion to file an otherwise unauthorized document.

The Department's letter to British Airways, which was filed in the Docket, clearly indicates that "representatives of U.S. Airways informed the Department of the possibility that certain information in the record of a pending civil case ... may be material and relevant to the issues under review" by the Department. We find that the US Airways' contact with the Department was neither a prohibited communication under the Department's rules (14 C.F.R. Part 300), nor a substantive communication relevant to the merits of the case under those rules.

Procedural Dates

Since we are now requiring British Airways to submit additional documents and information into the docket, we find it appropriate to extend our procedural schedule for filing answers from May 11 to May 22, 1998, and replies from June 10 to June 23, 1998. We find that this extension of time will provide all interested parties sufficient time to analyze adequately and comment fully on all material in the public and non-public record.

Accordingly:

1. We direct British Airways PLC to file in this docket, no later than three (3) business days from the date that this order is served, documents, information, and data as described in this order;
2. We direct interested parties to file answers to the joint application no later than May 22, 1998, and replies shall be filed no later than June 23, 1998;⁶
3. Interested parties may review the confidential materials, described in this order as follows: (1) in the U.S. Department of Transportation's Dockets Facility, Room PL 401, 400 Seventh Street, SW, Washington, D.C. 20590; and (2) in the offices of Sullivan and Cromwell, Counsel for British Airways, 1701 Pennsylvania Ave., N.W., 7th Floor, Washington, D.C. 20006 (contact Jeffrey W. Jacobs, (202) 956-7510). Interested parties shall submit in advance an affidavit stating that the person will preserve the confidentiality of the information and will only use it to participate in this proceeding. Further, each affidavit must specifically indicate that the person(s) are counsel or outside expert(s) for the interested parties in this case;⁷
4. We grant all motions for leave to file otherwise unauthorized documents; and

⁶ The original submissions are to be unbound and without tabs on 8½" x 11" white paper, using dark ink (not green) to facilitate use of the Department's document imaging system.

⁷ Any pleading or other filing that includes or discusses information contained in the confidential documents must be accompanied by a Rule 39 motion requesting confidential treatment.

5. We will serve this order on all persons on the service list in this docket.

By:

CHARLES A. HUNNICUTT
Assistant Secretary for Aviation
and International Affairs

(SEAL)

*An electronic version of this document is available on the World Wide Web at:
<http://dms.dot.gov/general/orders/aviation.html>*